Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

No. 97-899

In The

Supreme Court of the United States

October Term, 1997

GREGORY DENNIS,

Petitioner,

vs.

SCOTT PAPER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

KIRK C. SHAW
Counsel of Record
ARMBRECHT, JACKSON, DEMOUY, CROWE, HOLMES & REEVES, L.L.C.
Attorneys for Respondent
1300 AmSouth Center
63 South Royal Street
P.O. Box 290
Mobile, Alabama 36601
(334) 405-1302

72752
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

QUESTION PRESENTED

Whether a civil litigant's right to procedural due process under the Fifth Amendment is violated when his motion for continuance of trial to obtain substitute counsel is denied after, having been on notice of the scheduled trial date for over eight months, he dismissed his originally-chosen counsel forty-five days prior to trial.

STATEMENT PURSUANT TO RULE 29.6

The parties to the proceedings below were the Petitioner Gregory Dennis and Respondent Scott Paper Company. Kimberly-Clark Tissue Company is the successor by merger to Respondent. The parent company of Respondent is Kimberly-Clark Corporation. Respondent has no nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Citations	iii
Constitutional Provision Involved	1
Statement of the Case	1
Reasons for Denying the Writ	5
Conclusion	11

TABLE OF CITATIONS

Cases Cited:

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981)	7
Garza v. Carlson, 877 F.2d 14 (8th Cir. 1989)	7
Gideon v. Wainwright, 372 U.S. 335 (1963)	7
In re Gault, 387 U.S. 1 (1967)	7
Lassiter v. Department of Social Services, 452 U.S. 18 (1981)	7

Contents

	Page
McMann v. Richardson, 397 U.S. 759 (1970)	7
Mekdeci v. Merrell National Laboratories, 711 F.2d 1510 (11th Cir. 1983)	7
Strickland v. Washington, 466 U.S. 668 (1984)	7
Ungar v. Sarafite, 376 U.S. 575 (1964)	8, 9
United States v. Grow, 394 F.2d 182 (4th Cir.), *cert. denied*, 393 U.S. 840 (1968)	10
United States v. Pigford, 461 F.2d 648 (4th Cir. 1972)	10
United States v. Sexton, 473 F.2d 512 (5th Cir. 1973)	10
Urquhart v. Lockhart, 726 F.2d 1316 (8th Cir. 1984)	10
Statutes Cited:	
42 U.S.C. § 1981, *et seq.*	1
42 U.S.C. § 2000e, *et seq.*	1
United States Constitution Cited:	
Fifth Amendment	i, 1, 6, 11
Sixth Amendment	6, 7

Contents

Page

Rules Cited:

Fed. R. Civ. P. 50(a)(1) 3

Supreme Court Rule 10 5

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

This suit arose out of Petitioner Greg Dennis's ("Dennis") termination of employment with Respondent Scott Paper Company ("Scott Paper") in April 1995. Because of the nature of the issue raised by Dennis in his Petition, the dates of pertinent events will be specified in this Statement of the Case.

Following his termination, Dennis, an African-American, filed a charge of racial discrimination with the Equal Employment Opportunity Commission ("EEOC") in May 1995. While that charge was pending, Dennis filed a civil action in the United States District Court for the Southern District of Alabama (Southern Division) on July 10, 1995 alleging that Scott Paper had deprived him of his rights under the Civil Rights Act of 1866, 42 U.S.C. § 1981, *et seq*. Dennis was represented by attorneys Richard H. Meelheim and Christa Hayes Meelheim of Birmingham, Alabama, whom he had selected to represent him in his suit.

Subsequently, Dennis obtained a right-to-sue letter from the EEOC and, in December 1995, amended his Complaint to assert a claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*.

On September 11, 1995, the district court entered its Rule 16(b) Scheduling Order setting, among other things, discovery

cutoff for February 16, 1996 and trial to begin "sometime during the civil term beginning Tuesday, May 7, 1996." (R1-7). (Subsequently, on April 12, 1996, the case was rescheduled for jury selection on June 4, 1996, with trial to commence during the June trial term.)

Dennis was represented by his original counsel through discovery, which concluded on February 16, 1996, and a settlement conference with the Magistrate Judge on April 16, 1996, which was unsuccessful.

On April 19, 1996, forty-five days[1] prior to the scheduled striking of the jury, Dennis's counsel moved to withdraw as attorneys of record for him on the grounds that "[Dennis] has informed them that he no longer wishes for them to represent him in this matter, and that he intends to seek other representation." (R1-20). On April 29, 1996, counsel's motion to withdraw was granted "***provided*** counsel serves a notice of this order on plaintiff **on or before May 9, 1996** and submits proof of such service to the Court." (R1-22) (emphasis in original). The district court ordered Dennis to advise the court in writing on or before May 16, 1996 "of the identity of his newly retained counsel or his intent to proceed *pro se* (i.e., without representation by counsel)." *Id.* The court's order also stated:

> **THE FACT THAT PLAINTIFF DESIRES AND/ OR DOES RETAIN SUBSTITUTE COUNSEL WILL NOT CONSTITUTE GROUNDS TO CONTINUE THE JURY SELECTION AND**

---

1. In its opinion, the Eleventh Circuit observed that Dennis dismissed his attorneys around April 20, 1996, with knowledge that his trial date was within *forty* days. (App. 5a). More accurately, Dennis dismissed his counsel on or before April 19, which was at least *forty-five* days before the jury was scheduled to be selected on June 4, 1996.

TRIAL OF THIS ACTION AS SET DURING THE JUNE CIVIL TRIAL TERM OF COURT.

Id. (emphasis in original).

The following day, April 30, 1996, Dennis, *pro se*, filed a motion for continuance to obtain new counsel, to reopen and extend discovery, and to "complete" the pretrial disclosure document. (R1-23). On May 14, 1996, Dennis, who is a college graduate, advised the district court that he intended to proceed *pro se*. He also filed a supplemental motion for continuance and a motion to amend the pretrial order on that day.

Approximately two weeks before trial, on May 20, 1996, the district court denied Dennis's motion for continuance and his motion to amend the pretrial order. Dennis did not renew his motion for continuance thereafter.

On June 4, 1996, a jury was selected. Trial began the following day, June 5, and continued on June 6, 10, 11, and 12. Dennis used four days to present his case-in-chief, calling thirteen witnesses (in addition to himself) and introducing over forty exhibits. At the close of Dennis's evidence, Scott Paper's motion for a judgment as a matter of law under Fed. R. Civ. P. 50(a)(1) was granted by the district court with respect to Dennis's claims of racial discrimination with respect to "pay, promotions, and conditions of employment, and harassment," but denied with respect to Dennis's claim of "retaliatory discharge."

Following the presentation of Scott Paper's evidence and Dennis's rebuttal evidence, the jury returned a verdict in favor of Scott Paper as to Dennis's claim of retaliatory discharge and the district court entered judgment for Scott Paper.

Attorney Ronnie L. Williams noticed his appearance for Dennis on June 24, 1996 and filed a motion for a new trial and for judgment notwithstanding the verdict on behalf of Dennis. The motion was denied.

Dennis then appealed to the United States Court of Appeals for the Eleventh Circuit. Dennis raised two issues: (1) whether the district court abused its discretion in denying his motion for a continuance, and (2) whether the district court erred in granting Scott Paper's motion for judgment as a matter of law. The Eleventh Circuit affirmed the judgment of the district court. In addressing Dennis' claim that the district court abused its discretion in denying his motion for a continuance, Senior Circuit Court Judge Clark, who authored the panel's opinion, wrote:

> A lawyer's withdrawal does not afford a party an absolute right to a continuance.[1] The district court's ruling on a motion for continuance based on withdrawal of counsel will be disturbed only in extreme cases in which it is clear that the moving party is free of negligence.[2]
>
> In this case Dennis dismissed his attorneys around April 20, 1996, with knowledge that his trial date was within 40 days. In the order granting the withdrawal, the district court advised Dennis that the retention of substitute counsel would not constitute grounds for a continuance. Dennis's motion for continuance did not specify the length of the requested continuance, and did not indicate that he

---

1. *Arabian American Oil Co. v. Scarfone*, 939 F.2d 1472, 1478 (11th Cir. 1991)(citation omitted).

2. *Id.*

> would have been able to obtain counsel if a continuance had been granted. In fact, he elected to proceed *pro se*, and never renewed the motion for a continuance. Because Dennis failed to show that he was free of negligence in asking his attorneys to withdraw within 60 days of trial, or in seeking substitute counsel, it does not appear that the district court abused its discretion in denying the motion.

(App. 5a).

REASONS FOR DENYING THE WRIT

Review on a writ of certiorari "is not a matter of right, but of judicial discretion" to be granted "only for compelling reasons." Supreme Court Rule 10. Petitioner has failed to present any *compelling* reasons for the grant of certiorari. His petition does not fall within any of the reasons enumerated in Rule 10. It does not present a conflict among the lower courts or with a relevant decision of this Court, nor does it present an important question of federal law that has not been, but should be, settled by this Court, not does it contain any suggestion of departure "from the accepted and usual course of judicial proceedings." Rather, Petitioner's claim is nothing more than a garden variety complaint about the discretionary call of a district judge as to whether to grant a trial continuance, which complaint does not rise to the level of a constitutional issue under these circumstances.

It is undisputed that Petitioner Dennis began his action with counsel of his own choosing. Dennis was on notice of the scheduled trial date a full eight months prior thereto. After Dennis had proceeded with his counsel for approximately nine and one-half months, at a point when discovery had been closed for over two months, a pretrial order entered, and a settlement

conference with the Magistrate-Judge unsuccessfully completed, Dennis dismissed his counsel, knowing that jury selection was forty-five days away. Dennis was cautioned at the time by the district court that the trial would not be continued should he be unsuccessful in obtaining new counsel. Nevertheless, Dennis pursued the case without his originally-chosen counsel. He informed the Court approximately three weeks before trial that he intended to proceed *pro se*. After the court denied Petitioner's motion for continuance two weeks prior to trial, Dennis never renewed his motion or otherwise showed any reluctance to proceed *pro se*.

Dennis, a college graduate, filed four pleadings, including a well-stated, six page motion to amend the pretrial order. At trial, Dennis ably represented himself, calling and examining thirteen witnesses (in addition to himself), cross-examining Respondent's five witnesses, introducing into evidence over forty exhibits, presenting his opening statement, and making his closing argument to the jury. If there was any prejudice to Dennis because of his lack of counsel at trial, Dennis must assume responsibility for same, since it was he who requested his originally-chosen counsel to withdraw six weeks before trial. The district judge acted well within his range of discretion in denying the continuance. The Court of Appeals for the Eleventh Circuit also correctly concluded that this was not one of the "extreme cases" where it is clear that "the moving party is free of negligence" and a continuance should have been granted. Certainly, Dennis's Fifth Amendment due process rights were not implicated here.

In his Petition, Dennis cites case authority construing criminal cases under the Sixth Amendment to argue, first, that he has a constitutional right to "effective assistance" of counsel in his civil proceeding and, second, that the district court violated his due process rights by denying his motion for a continuance

in order to obtain replacement counsel for his allegedly "ineffective counsel."

The Sixth Amendment cases are inapposite to this civil suit. This Court has drawn distinctions between a defendant's rights where his personal liberty is at stake versus a litigant's rights in a civil case where personal liberty is not at issue. For example, where a litigant may lose his physical liberty if he loses the litigation, the Court has recognized a right to appointed counsel. *In re Gault*, 387 U.S. 1 (1967); *Gideon v. Wainwright*, 372 U.S. 335 (1963). Where there is no threatened loss of physical liberty, however, the Court has refused to find a constitutional right to appointed counsel. *Lassiter v. Department of Social Services*, 452 U.S. 18, 25 (1981). Further, in criminal cases, the Court has held that the right to counsel under the Sixth Amendment includes the right to the "effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984), quoting *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). However, no comparable, constitutional right to effective assistance of counsel has ever been imposed in a civil case. *See Garza v. Carlson*, 877 F.2d 14, 17 (8th Cir. 1989); *Mekdeci v. Merrell National Laboratories*, 711 F.2d 1510, 1522 (11th Cir. 1983).

Moreover, the case at bar is not an appropriate one for the Court to address the weighty issues of a litigant's claimed "right" to "effective assistance" of counsel in a civil suit, or whether a civil litigant's due process rights are violated by the denial of his motion for continuance in order to obtain substitute counsel. In the first place, the issue of the effectiveness of Petitioner's counsel was not presented to the Court of Appeals for its consideration. Ordinarily, this Court does not address issues which were not first presented to the lower court. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

Secondly, Petitioner's allegations regarding the inadequacy of his former counsel present matters *dehors* the record in this case. There is no evidence in the record as to any witness whom Dennis's former counsel failed to interview, nor any allegedly "critical document" which Dennis requested, but counsel failed to obtain. More importantly, there is no evidence in the record of any witness who could not testify at trial, nor any document which Dennis required for trial, but was unable to get. The Court cannot evaluate Dennis's claim of ineffective counsel on the record in this case.

Finally, Dennis requested his counsel to withdraw forty-five days prior to trial, which was not a constitutionally inadequate time for him to hire replacement counsel and prepare his case. *See Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (five days notice of criminal contempt proceeding was constitutionally adequate time to hire counsel and prepare a defense under the circumstances).

But even applying the standards of review established by the Court in the area of criminal law, it is apparent that the district court's denial of a continuance in this instance was not an abuse of its discretion and, certainly, not a violation of Dennis' due process rights.

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. . . . Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. . . . There are no mechanical tests for deciding when a denial of a continuance is

> so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

Ungar, supra, at 589 (citations omitted).

Dennis' motion for continuance was not limited to a request for a continuance of the trial setting. His motion also requested the reopening of discovery and an opportunity to amend the pretrial disclosures. The motion did not specify the length of the requested continuance, but it implicitly requested a lengthy continuance to accomplish the foregoing. No representation was made that prospective counsel had been contacted or that substitute counsel had agreed to appear if a continuance were granted.

Dennis supplemented his motion for continuance two weeks later to allege that his grandmother, for whom he claimed to be the "primary caretaker," had suffered a heart attack on April 29, 1996. This ground was not in Dennis' initial motion for continuance, filed on April 30, *the day after* the alleged heart attack. No verification of Dennis' grandmother's heart attack was ever provided the district court, nor was there ever any explanation as to why Dennis' mother, who lives in the same city as Dennis and his grandmother, was unable to care for Dennis' grandmother. Evidence was adduced at trial, however, that Dennis had used his grandmother's alleged illnesses before to excuse his absences from work following disputes with his superiors. (R3-310).

Thus, it likely appeared to the district court that Dennis was seeking to use his dismissal of counsel as an opportunity to extend discovery and reopen all that had been done in the case to that point. At the least, the district court could genuinely

question Dennis' good faith because of the timing of his dismissal of counsel, over two months after the close of discovery, and his immediate filing of a motion for continuance. Also, the court could genuinely question Dennis' allegations of his grandmother's condition in light of the fact that it was not included in his original motion filed the day after her alleged heart attack. The circumstances of this case do not support Dennis' claim that the district court abused Dennis' procedural due process rights in denying his motion for continuance.[2]

In summary, Dennis began his suit with counsel of his own choice. After approximately nine and one-half months of litigation, when the case was ready for trial and settlement had been unfruitful, Dennis dismissed his counsel, knowing that trial was forty-five days away. After being warned by the district court that the trial would not be continued should he be unsuccessful in obtaining new counsel, Dennis nevertheless pursued the case without his original counsel, trying to reopen discovery and restructure the case to suit his wishes. After Dennis's motion for continuance was denied two weeks prior to trial, Dennis never renewed his motion for a continuance. Instead, he proceeded to ably represent himself at trial. Under

---

2. There are numerous cases in which the Courts of Appeal have affirmed the denial of motions for continuance in criminal cases, where the Sixth Amendment's guarantees to counsel apply, under circumstances even more favorable to the movant than here. *See, e.g., Urquhart v. Lockhart*, 726 F.2d 1316, 1319 (8th Cir. 1984) (defendant represented by appointed counsel requested continuance on day of trial in order to retain private counsel); *United States v. Sexton*, 473 F.2d 512, 513 (5th Cir. 1973) (defendant who had had ample time to employ counsel sought continuance to discharge court-appointed counsel and retain private counsel); *United States v. Pigford*, 461 F.2d 648, 649 (4th Cir. 1972) (defendant sought continuance at trial to change private counsel); *United States v. Grow*, 394 F.2d 182, 209 (4th Cir.) (defendant who discharged counsel on eve of trial sought continuance in order to secure replacement), *cert. denied*, 393 U.S. 840 (1968).

the circumstances, Dennis has not been denied or deprived of procedural due process under the Fifth Amendment to the United States Constitution.

CONCLUSION

The decision of the Eleventh Circuit in this case is well-reasoned and imminently correct. Clearly, Petitioner's right to procedural due process was not abridged by the district court's denial of his motion for continuance following his dismissal of his attorneys with knowledge that his trial date was within forty-five days.

Accordingly, Petitioner has failed to advance any reason, and clearly no *compelling* reason, for grant of certiorari. For the foregoing reasons, it is respectfully submitted that his Petition should be denied.

Respectfully submitted,

KIRK C. SHAW
Counsel of Record
ARMBRECHT, JACKSON, DeMOUY,
CROWE, HOLMES & REEVES, L.L.C.
Attorneys for Respondent
1300 AmSouth Center
63 South Royal Street
P.O. Box 290
Mobile, Alabama 36601
(334) 405-1302